

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
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4 Larry Dwayne Smith,
5 Petitioner
6 v.
7 Brian Williams, et al.,
8 Respondents
9

2:14-cv-02218-JAD-CWH

Order Denying Petition, Denying
Certificate of Appealability, and
Closing Case

[ECF No. 5]

10 Nevada state-prison inmate Larry Dwayne Smith brings this § 2254 petition to challenge his
11 state-court conviction and sentence for robbery and related charges. Having reviewed Smith's
12 petition, respondents' answer, and Smith's reply, I find that Smith is not entitled to federal habeas
13 relief, so I deny his petition and decline to issue a certificate of appealability.

14 **Background**

15 A jury in Nevada's Eighth Judicial District Court found Smith guilty of conspiracy to commit
16 larceny from the person, robbery, and larceny from the person.¹ At the sentencing hearing, the state
17 conceded that the second larceny charged merged with the robbery charge, and the state district court
18 dismissed that larceny count.² Smith appealed; the Nevada Supreme Court affirmed.³

19 Smith then filed a post-conviction habeas petition in the state district court.⁴ The state district
20 court denied the petition,⁵ Smith appealed, and the Nevada Supreme Court affirmed.⁶ Smith then
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22 ¹ ECF No. 12-4.

23 ² ECF No. 12-6 at 4, 9.

24 ³ ECF No. 13-7.

25 ⁴ ECF No. 13-14.

26 ⁵ ECF No. 14-4.

27 ⁶ ECF No. 14-13.
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1 timely commenced this federal habeas action. He asserts two grounds for relief: (1) the evidence
2 presented at trial was insufficient to support the jury's verdict on the robbery count and (2) trial
3 counsel was ineffective. I address each in turn.

4 **Discussion**

5 **A. Standard for habeas relief under 28 U.S.C. § 2254(d)**

6 A federal court may not grant an application for a writ of habeas corpus on behalf of a person
7 in state custody on any claim that was adjudicated on the merits in state court unless the state-court
8 decision (1) was contrary to, or involved an unreasonable application of, clearly established federal
9 law or (2) was based on an unreasonable determination of the facts in light of the evidence presented
10 in the state-court proceeding.⁷ Because de novo review is more favorable to the petitioner, federal
11 courts can deny claims by engaging in de novo review rather than applying the deferential AEDPA
12 standard.⁸

13 **B. Smith is not entitled to federal habeas relief on claim one.**

14 Smith argues that the evidence at trial was insufficient to support the jury's guilty verdict on
15 the robbery charge. The Nevada Supreme Court rejected this claim and summarized at length the
16 evidence presented at trial. That evidence showed that Smith took money out of the victim's pocket
17 without the victim's consent and then, when the victim tried to stop him, Smith punched the victim
18 in the face to facilitate his escape. The use of even slight force to facilitate escape after the unlawful
19 taking of personal property from the person of another is sufficient to constitute robbery under
20 Nevada law.⁹ Accordingly, the evidence presented at trial was sufficient to support the jury's guilty
21 verdict on the robbery charge, and claim one is denied.

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26 ⁷ 28 U.S.C. § 2254(d).

27 ⁸ *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

28 ⁹ NEV. REV. STAT. § 200.380.

1 **C. Ineffective assistance of counsel under 28 U.S.C. § 2254(d)**

2 In *Strickland v. Washington*, the United States Supreme Court established a two-prong test
3 for ineffective-assistance-of-counsel claims.¹⁰ A petitioner must show (1) that the defense attorney's
4 representation "fell below an objective standard of reasonableness" and (2) that the attorney's
5 deficient performance prejudiced the defendant so severely that "there is a reasonable probability
6 that, but for counsel's unprofessional errors, the result of the proceeding would have been
7 different."¹¹ If a state court has adjudicated a claim of ineffective assistance of counsel, federal
8 habeas courts ask only "whether there is any reasonable argument that counsel satisfied *Strickland*'s
9 deferential standard."¹²

10 **D. Smith is not entitled to federal habeas relief on claim two.**

11 In ground two, Smith claims that his trial counsel was constitutionally ineffective for failing
12 to move to suppress the victim's one-on-one identification of Smith as unnecessarily suggestive.
13 The Nevada Supreme Court denied this claim, finding that Smith failed to show deficiency or
14 prejudice: counsel was not ineffective for failing to challenge identity where identity was not an
15 issue. Even if counsel had made the motion, Smith did not show that it would have been successful.
16 And Smith failed to show prejudice because the co-defendant testified that he saw Smith take the
17 victim's property.¹³

18 There is a reasonable argument that Smith's counsel satisfied *Strickland* and the Nevada
19 Supreme Court reasonably applied that standard, so Smith is not entitled to relief on his ineffective-
20 assistance claim.

23 ¹⁰ *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

24 ¹¹ *Id.* at 694.

25 ¹² *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *see also Cheney v. Washington*, 614 F.3d 987,
26 994–95 (9th Cir. 2010) (acknowledging double deference required for state-court adjudications of
27 *Strickland* claims).

28 ¹³ ECF No. 14-13.

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2 **E. I decline to issue a certificate of appealability.**

3 To obtain a certificate of appealability, a petitioner must make “a substantial showing of a
4 denial of a constitutional right”¹⁴ by showing that “reasonable jurists would find the district court’s
5 assessment of the constitutional claim debatable or wrong.”¹⁵ To meet this threshold, the petitioner
6 must demonstrate that the issues are debatable among jurists of reason, that a court could resolve the
7 issues differently, or that the questions are adequate to deserve encouragement to proceed further.¹⁶
8 Because no reasonable jurist would find my conclusions in this order debatable or wrong, I decline to
9 issue Smith a certificate of appealability.

10 **Conclusion**

11 Accordingly, IT IS HEREBY ORDERED that Smith’s petition for writ of habeas corpus
12 **[ECF No. 5] is DENIED, and I decline to issue a certificate of appealability.** The Clerk of Court
13 is directed to enter judgment for respondents and against Smith and to CLOSE THIS CASE.

14 Dated this 8th day of November, 2016.

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16 Jennifer A. Dorsey
17 United States District Judge
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26 ¹⁴ 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

27 ¹⁵ *Slack*, 529 U.S. at 484.

28 ¹⁶ *Id.*